Supreme Court of the United States

..... TERM, 197....

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

—against—

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT TRADAX OVERSEAS, S.A.

JOHN F. O'CONNELL
Counsel for Respondent
Tradax Overseas, S.A.
One Battery Park Plaza
New York, New York 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Supreme Court of the United States

..... TERM, 197....

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

—against—

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT TRADAX OVERSEAS, S.A.

Introduction

Respondent, Tradax Overseas, S.A. ("Tradax") herewith submits its brief in opposition to the petition for Writ of Certiorari of the petitioner, Otello Mantovani ("Mantovani").

Jurisdiction

This Court does not have jurisdiction to grant the Writ of Certiorari sought by petitioner pursuant to 28 U.S.C. §1257(3). Respondent Tradax will demonstrate that the decision below was based upon adequate state grounds; was not a final decision; and does not involve a federal question of substance.

Re-Statement of the Questions Presented

We do not agree with the petitioner's statement of the questions presented, and set forth herein Respondent Tradax' counterstatement of the issues assuming that this Court finds that it has jurisdiction, which we deny.

1. Did Special Term err in holding that there were no public policy questions presented which would nullify the petitioner's agreement to arbitrate all sale contract disputes or supersede the general policy in favor of arbitration?

2. Did Special Term err in holding that mere allegations of bias will not at this stage prevent enforcement of an agreement to arbitrate before a contractually stipulated panel?

Re-Statement of the Case

Respondent Tradax sets forth certain facts pertaining to its dispute with petitioner Mantovani.

On November 19, 1974, Mantovani (an Italian citizen) as buyer, entered into an international export sale contract

with Tradax (a Panamanian corporation) as seller, to purchase 25,000 metric tons of No. 3 U.S. Yellow Corn for delivery FOB from a U. S. Gulf Port. The contract expressly provided that it was subject to the terms and conditions of the North American Export Grain Association Form #2 ("NAEGA-2"). In the applicable printed provisions of the NAEGA-2 form, the corn was expressly warranted to be *not* "free from defect". Instead the parties stipulated:

> "Quality and condition final at loading as per inspection certificate (Appendix E, A25)."

The contract also contained an arbitration clause which provided as follows:

> "Buyer and seller agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association or its successors, pursuant to the Grain Arbitration Rules of the American Arbitration Association, as the same may be in effect at the time of such arbitration proceeding, which rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The arbitration award shall be final and binding on both parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other Court having Jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and of all the

Courts in the State of New York. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding." (Appendix E, A26).

The Grain Arbitration Rules of the American Arbitration Association (hereinafter "AAA"), incorporated by reference in the contract, provided that binding arbitration of all contractual disputes was to be before a commercial panel of arbitrators maintained by the AAA of persons who are "actively engaged in, or have retired from active engagement in, the grain trade business." (Appendix F, A28)

The manner of selection of the arbitrators by the AAA's administrator, as set forth in Section 9 of the Grain Arbitration Rules, was as follows:

"Arbitrations under these Rules shall be held before three arbitrators who, subject to their availability to serve, as determined by the Administrator, shall be chosen by the Administrator from the Panel in alphabetical order of their surnames, starting with the first name on the list and continuing through to the end. For the next and each following arbitration, arbitrators shall be chosen as provided in the preceding sentence, starting with those eligible on the Panel who have not served on the previous arbitration. The same method of choosing arbitrators shall be repeated from the beginning to the end of the Panel as often as is necessary in order to choose the number of arbitrators required for any given arbitration." (Appendix F, A29)

Finally, Section 11 of the Grain Arbitration Rules provided for the following disclosure and challenge procedure:

"A person appointed as an arbitrator shall disclose to the Administrator any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the Administrator shall communicate such information to the parties, and, if the Administrator deems it appropriate to do so, to the arbitrators. Thereafter, AAA shall determine whether the arbitrator should be disqualified and the Administrator shall inform the parties of the decision of AAA." (Appendix F, A29).

The claim of Tradax involved in its November 11, 1975 demand for arbitration arose in the following manner. The bulk carrier vessel MOSGULF was nominated in accordance with the sale contract and arrived to load the cargo of corn which was to be delivered from Cargill Incorporated's Port Allen grain facility at Baton Rouge, Louisiana. However, commencing on or about June 10, 1975 and continually thereafter, Mantovani refused to accept delivery of the corn. The reason proffered by Mantovani to excuse his refusal was, in substance, that the contract terms entitled him to have the sampling of the corn "effectuated" at "the end of the loading spout in the [vessel's] hold" instead of via the mechanical diverter-sampling process installed in the Baton Rouge elevator to get samples for testing and official certification of the quality of the corn by the USDA. Although Tradax pointed out that this

sampling method was approved by USDA for use at Baton Rouge and must be utilized in order to obtain USDA's official certificates of quality as per the contract and that the contract terms did not support Mantovani's position, Mantovani remained adamant in his refusal to accept delivery. As a result of this impasse, Tradax declared Mantovani in default and in due course, submitted its claim for damages from Mantovani's breach of contract in the sum of $769,354.38. Thereafter, on November 11, 1975, Tradax sent Mantovani its Demand for Arbitration for recovery of its damages. Instead of arbitrating in accordance with its contract, Mantovani petitioned on December 23, 1975 for a stay of arbitration pursuant to Article 75 of the New York Civil Practice Law and Rules. Its motion was denied by Special Term (Stecher, J.) on October 6, 1976 (Appendix A) and unanimously affirmed by the New York Appellate Division, First Department (Appendix B) on June 2, 1977. Thereafter, on October 18, 1977, motion for leave to appeal to the New York State Court of Appeals was denied (Appendix C).

ARGUMENT

POINT I

There is no jurisdiction for certiorari under 28 U.S.C. §1257(3) where the state court judgment rests on adequate state grounds.

An adequate state substantive ground bars certiorari, *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1964), citing *Murdock* v. *City of Memphis*, 20 Wall 590; adequate state procedural grounds also bar review on certiorari. *Fay* v. *Noia*, 372 U.S. 391, 428-429 (1963) and cases cited there. A valid

and effective state statute may likewise constitute an adequate ground for this Court to refrain from reviewing the state court decision. *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964).

Here, the Special Term relied expressly on state law in rejecting petitioner's arguments that either a public policy question or alleged potential bias of the panel barred arbitration (Appendix A). *In re National Equipment Rental* and *American Pecco Corp.*, 28 N.Y. 2d 638, 320 N.Y.S. 2d 248 (1971); *Matter of Astoria Medical Group* v. *Health Ins. Co.*, 11 N.Y. 2d 128 (1962); New York C.P.L.R. Sec. 7511 (b)(1)(ii). These are adequate, independent state substantive grounds which bar review in this court.

The state court order compelling arbitration relied on no federal ground. It held (and was affirmed) that "whether the principles underlying the United States Grain Standards Act (7 U.S.C. Sec. 71 et seq.) are being carried out by the Department of Agriculture is not an issue before this Court." (Appendix A2). The Court went on to compel arbitration pursuant to state statute New York C.P.L.R. Sec. 7501 et seq. based upon "a straight forward contract of sale containing a broad arbitration provision." (Appendix A2).

Similarly, the state court's order to arbitrate imports no federal certiorari-jurisdiction question merely because arbitration could have been ordered by either of the parallel state and federal statutes, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Matter of Weinrott*, 32 N.Y. 2d 190, 199 n.2, 344 N.Y.S. 2d 848, 856 n.2 (1973). The state court was not required to and did not rely on the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.) in order-

ing the parties to arbitration. Even if it had relied on the federal statute, the result would have been the same.

In any event, petitioners did not claim a "right, privilege or immunity" under the Federal Arbitration Act in any court below, and could not do so because they resisted the very arbitration which that statute compels (9 U.S.C. Sec. 2).

The state court ruling here for review is thus solidly based on valid state law. It cannot be said that the determination below is "so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irr. Dist.* v. *Farmers Mutual Canal Co.,* 243 U.S. 157, 164 (1916) or "unsubstantial and illusory," *Lawrence* v. *State Tax Commission of Mississippi,* 286 U.S. 276, 282-83 (1932) the criteria required to be found (but not present herein) to permit certiorari jurisdiction.

POINT II

The decision appealed from is not properly reviewable by certiorari because it is not final.

Petitioners appeal from a decision ordering them to arbitration (Appendix A). The Special Term rejected petitioner's arguments that arbitration was improper because of a public policy concern or because of alleged bias in the arbitration panel, relying on New York C.P.L.R. Article 75, specifically Sec. 7511(b)(1)(ii) which provides for application to vacate arbitration awards for partiality of an arbitrator appointed as a neutral and Sec. 7511(b)(1)

which elsewhere provides for vacatur for corruption, fraud, abuse of power or improper procedure. Petitioners will, therefore eventually have the opportunity to raise their objections to the panel in the state court after the arbitration has been held. Moreover, petitioner's claim of "overriding federal policy" immunity can likewise be heard by state courts exercising their general equity powers on a hearing of an application to confirm any award pursuant to New York C.P.L.R. Sec. 7510. *Myers* v. *Kinney Motors, Inc.,* 32 A.D. 2d 266, 301 N.Y.S. 2d 171 (1st Dept., 1969); 8 *Weinstein-Korn-Miller,* N.Y. Civil Practice, Sec. 7510.07.

It is well-settled that this Court will not take jurisdiction of state court decisions which are not final because not dispositive of the rights of any party. *Arceneaux* v. *Louisiana,* 376 U.S. 336 (1964); *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67 (1948).

This is not a case in which denial of immediate review threatens the exercise of federally protected rights or strong federal policy interests. *Local No. 438 Const. and General Laborer's Union AFL-CIO* v. *Curry,* 371 U.S. 542 (1963). On the contrary, the decision below advances the federal policy favoring arbitration subject to judicial review and enforcement 9 U.S.C. Sec. 1 et seq., *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 510-11 (1974). Nor is this case one in which a concession as to facts makes state proceedings a meaningless gesture. *Mills* v. *Alabama,* 384 U.S. 214 (1966); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Instead, the privileges petitioners assert depend on the resolution of factual issues yet to be heard by arbitrators or the courts below.

POINT III

This petition does not present any question requiring consideration under Rule 19 of this Court.

Rule 19 of this Court makes clear that review on Writ of Certiorari "is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Respondents submit that the decision below presents no federal question of substance because it involves an international export sale contract, and compelling arbitration of disputes arising out of such a contract is entirely in accord with the decision of this court in *Scherk* v. *Alberto-Culver,* 417 U.S. 506 (1974), as well as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. Sec. 201, et seq.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN F. O'CONNELL
Counsel for Respondent
Tradax Overseas, S.A.